

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HERMAN LEE BARTON, JR.,

Petitioner,

v.

WASHINGTON DEPARTMENT OF
CORRECTIONS,

Respondent.

Case No. C15-1779 RAJ-BAT

**REPORT AND
RECOMMENDATION**

Petitioner Herman Lee Barton, Jr. filed a petition for writ of habeas corpus and application for leave to proceed *in forma pauperis* (IFP) on November 6, 2015. Dkt. 1, 4. The undersigned recommends that the petition be dismissed without prejudice for failure to exhaust state judicial remedies and the IFP application denied as moot.

BACKGROUND

In his petition, Mr. Barton seeks relief from a judgment of conviction by guilty plea of harassment entered in the Whatcom County Superior Court on September 17, 2015. Dkt. 1-1, at 2. Mr. Barton did not appeal his conviction. *Id.*

DISCUSSION

Mr. Barton may pursue federal habeas relief only *after* he has exhausted his state judicial remedies. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). The exhaustion of state court

1 remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. §
2 2254(b)(1). A petitioner can satisfy the exhaustion requirement by providing the highest state
3 court with a full and fair opportunity to consider all claims before presenting them to the federal
4 court. *Picard v. Connor*, 404 U.S. 270, 276 (1971); *Middleton v. Cupp*, 768 F.2d 1083, 1086
5 (9th Cir. 1985). A state prisoner must present the state courts with the same claim he urges upon
6 the federal courts. *Picard, supra*.

7 According to his habeas petition, Mr. Barton was convicted less than three months ago.
8 He did not file a direct appeal of his conviction nor has he presented any federal constitutional
9 claims in either the Washington Court of Appeals or the Washington Supreme Court on
10 collateral appeal. Therefore, Mr. Barton has not fully exhausted his claims in the state appellate
11 courts. Mr. Barton's petition should be dismissed without prejudice to the filing of a federal
12 habeas petition after he has exhausted his state judicial remedies. An evidentiary hearing is not
13 necessary.

14 CERTIFICATE OF APPEALABILITY

15 If the District Court adopts the Report and Recommendation, it must determine whether a
16 certificate of appealability ("COA") should issue in regards to Mr. Barton's habeas petition.
17 Habeas Rule 11(a). A COA may be issued only where a petitioner has made "a substantial
18 showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(3). A petitioner
19 satisfies this standard "by demonstrating that jurists of reason could disagree with the district
20 court's resolution of his constitutional claims or that jurists could conclude the issues presented
21 are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322,
22 327 (2003). The Court recommends a COA not be issued. No jurist of reason could disagree
23 with the Court's determination that Mr. Barton's claims are not yet exhausted. Mr. Barton

1 should address whether a COA should issue in his written objections, if any, to this Report and
2 Recommendation.

3 **CONCLUSION**

4 Under Habeas Rule 4, the Court should dismiss a habeas petition if it plainly appears
5 from the petition that the petitioner is not entitled to relief. Here, the Court cannot grant relief
6 because Mr. Barton has not yet exhausted his state court remedies. The Court therefore
7 recommends that Mr. Barton's § 2254 petition be **DISMISSED without prejudice** and his IFP
8 application **Denied**. The Court also recommends denying issuance of a COA.

9 A proposed Order accompanies this Report and Recommendation. Any objections to this
10 Recommendation must be filed by **Thursday, December 24, 2015**. The matter will be ready for
11 Court's consideration on **Monday, December 28, 2015** and the Clerk should so note it.
12 Objections shall not exceed seven pages. The failure to timely object may affect the right to
13 appeal.

14 The Clerk shall also provide a copy of this Report and Recommendation to Petitioner and
15 to the Honorable Richard A. Jones.

16 Dated this 7th day of December, 2015.

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18 BRIAN A. TSUCHIDA
19 United States Magistrate Judge
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